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INTERIM REPORT OF THE AD HOC WORKING GROUP OF EXPERTS PREPARED IN ACCORDANCE WITH COMMISSION ON HUMAN RIGHTS RESOLUTIONS 1989/3 AND 1989/5 AND ECONOMIC AND SOCIAL COUNCIL DECISION 1989/136

Addendum

Report of the visit to Namibia by the Ad Hoc Working Group on southern Africa (12-17 February 1990)

GE. 90-10820

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Introduction

1. Since its establishment in 1967, the Ad Hoc Working Group of Experts on southern Africa has studied the situation prevailing in Namibia under its mandate, which was renewed and extended through various resolutions and decisions of the Commission on Human Rights and the Economic and Social Council. At its forty-fifth session, in resolution 1989/3 (para. 22). the Commission on Human Rights requested the Group, inter alia, to make an on-the-spot investigation in 1989 of living conditions in Namibia and the treatment of the Namibian people by the racist South African regime.

2. The Commission on Human Rights further decided, by its resolution 1989/5 (para. 26), that the Ad Hoc working Group of Experts should be composed of the following experts acting in their personal capacity: Mr. Felix Ermacora (Austria); Mr. Humberto Díaz Casanueva (Chile); Mr. Mulka Govinda Reddy (India); Mr. Elly-Elikunda E. Mtango (United Republic of Tanzania); Mr. Branamir Jankovic (Yugoslavia); Mr. Mikuin Leliel Balanda (Zaire). In accordance with the procedure established by the Working Group, Mr. Balanda was re-elected chairman of the Group and Mr. Díaz Casanueva vice-chairman.

3. In reply to a request by the Working Group in pursuance of the above-mentioned resolution, the Government of the Republic of South Africa agreed by cable dated 18 December 1989 to its visiting Namibia. The visit to Namibia took place from 12 to 17 February 1990. Four members of the Working Group carried out the visit; Mr. Humberto Díaz Casanueva and Mr. Branimir Jankovic were not able to join the Group.

4. During its visit, the members of the Group were received by the Special Representative of the Secretary-General, Mr. Martti Ahtisaari, and the Administrator-General of Namibia, Mr. Louis Pienaar. They further met with Mr. Theo Ben Gurirab, Minister of Foreign Affairs-designate and officials of the Ministry of Justice. The Group also had the opportunity to hold hearings with a number of witnesses and representatives of human rights organizations, church and other associations. They also met with the representatives of political parties, the Democratic Turnhalle Alliance and the United Democratic Front. Within the short time available, the Group endeavoured to hear the widest possible range of views on the situation currently prevailing in Namibia. Information received by the Group indicates, moreover, that the infamous commando unit "Koevoet" has been dismantled.

5. The present report, which reflects the situation as drawn up from the information made available to the Group, supplements that contained in its interim report already submitted to the Commission on Human Rights (E/CN.4/1990/7).

6. The Ad Hoc Working Group has always been guided by a sole objective, namely, to inform the international community with maximum objectivity. On the basis of the supplementary information gathered, the Group analyses briefly in part I the general political situation and human rights approach. Part II contains an analysis of the information received as regards civil, political, economic, social and cultural rights. Part III analyses the human rights provisions contained in the Constitution. Concluding observations and recommendations are presented in part IV.

7. The Ad Hoc Working Group of Experts wishes to emphasize that it has always endeavoured to discharge its mandate in a humanitarian spirit and with a non-accusatory approach. Its visit to Namibia should therefore be viewed in that light.

I. GENERAL POLITICAL SITUATION AND HUMAN RIGHTS APPROACH

8. During its consultations with leaders of the major political parties in Namibia (SWAPO, DTA and UDF), the Ad Hoc Working Group of Experts noted a willingness on their part to work for the implementation of democratic principles in a future and independent Namibia in a positive and constructive spirit, instead of organizing a purely sterile opposition.

9. According to the above-mentioned political parties, the principles of fundamental rights and freedoms contained in the Constitution represent a platform that will effectively ensure respect for and protection of human rights within the country.

10. In their view, despite a number of difficulties inherent in the situation formerly prevailing in the country, the Namibian people should be able to enjoy all civil and political rights and participate in their country's economic, social and cultural development.

11. On the basis of abundant information received, the Working Group of Experts feels that there is room for optimism for the future of Namibia as a democratic State whose long-awaited independence will become a reality on 21 March 1990.

II. ANALYSIS OF THE INFORMATION RECEIVED

A. Civil and political rights

1. Right to life

12. It may be noted that, according to information provided by Mr. David Smuts, Director of the Legal Assistance Centre, at the 765th meeting of the Group, there were 10 prisoners awaiting execution. It is very likely that these condemnded prisoners will not be executed, in view of article 6 of the Constitution mentioned below.

13. Under article 6 of the Constitution of Namibia, the right to life is respected and protected, and no court of law is competent to impose the death sentence.

2. Detention, including cases of death in detention

14. According to information provided to the Working Group by the witnesses mentioned above at the 765th meeting, the number of persons reported in 1989 to be either already in detention or detained during that year was 30; they were being held under security legislation, i.e. without trial. All had been released by mid-1989, most of them before 1 May 1989 and some in an exchange of prisoners between the security forces and the People's Republic of Angola. Nine other persons had been reported missing but there was no evidence to show

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that they had been detainees. Legislation providing for detention without trial had been repealed in compliance with the provisions of Security Council resolution 435 (1978), which required the repeal of all discriminatory legislation. Thus, according to the same witnesses, since July 1989 no one was being held in detention without trial in Namibia.

15. Article 11 of the Constitution provides that no one shall be subject to arbitrary arrest or detention; it further provides that an arrested person must be informed promptly, and in a language he or she understands, of the grounds for such arrest. Every arrested person must be produced before the nearest magistrate or other judicial officer within 48 hours of his arrest and may not be detained beyond such a period without legal authorization.

16. The foregoing provisions are not applicable to illegal immigrants held in custody under the relevant law.

17. No information has been received by the Group concerning cases of death in detention.

3. Ill-treatment and torture

18. In addition to the cases of ill-treatment and torture which are referred to in its interim report (E/CN.4/1990/7), the Working Group has been informed of other such cases by witnesses and from various concurrent reports.

19. Article 8 of the Constitution guarantees respect for human dignity during the enforcement of a penalty and provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

20. Under article 9 of the Constitution, no one may be held in slavery or servitude, and forced labour is illegal, except in specific cases, inter alia when such labour is required in consequence of a sentence or order of a court or when it is required of members of the Defence Force.

4. Administration of justice

21. The Group notes that it is difficult to think in terms of an independent judiciary in a country where not only all the legislation is based on apartheid, but also where all the members of the judiciary are white. Nevertheless, it was indicated that in isolated cases the judiciary had of late been trying to act independently.

22. Under article 12 of the Constitution, all persons are entitled to a fair and public trial before an independent, impartial and competent court or tribunal established by law, and must be presumed innocent until proved guilty in accordance with the law.

23. No one may be tried, convicted or punished for any criminal offence for which he has already been convicted or acquitted in accordance with the law.

24. Further, no one may be tried or convicted for any criminal offence or in respect of any act or omission which did not constitute a criminal offence at the time when it was commited.

5. Political trials

25. It was reported in the Namibian of 11 February 1990 that the five students convicted for public violence in Walvis Bay regional court in November 1989 and sentenced to three years' imprisonment had been amnestied and released, according to an announcement made by the Administrator General Mr. L. Pienaar. The sentences passed in November 1989 had been considered grossly excessive, since the five had been engaged in a student boycott and had been guilty of only minor violence.

26. The five students in question were: Johanna Kambanda, Mingeli Erastus, Paulus Shimbanda, Rosalia Shipiki and Diinina Nakwafila.

27. However, Leonard Sheehama, convicted in Walvis Bay, is still on death row in the Republic of South Africa, since he had not been sentenced to death by the Supreme Court of Namibia (see interim report of the Working Group, E/CN.4/1990/7, para. 266). At the time of the trial, Mr. Sheehama's acts had been considered as politically motiviated; however, the Administrator-General refused to grant an amnesty, maintaining that the charges on which he had been convicted were particularly grave.

28. According to information contained in the Namibian dated 13 February 1990, former Sergeant Dirk Calitz, who had battered to death the 50-year-old Mr. Wilhelm Haindonga at his homestead in northern Namibia in 1986, and who had started a 10-year sentence on 25 January 1990 after his conviction, was also given an amnesty under the Amnesty Proclamation AG 13 of 1989.

29. It was reported in the Namibian of 11 February 1990 that Mr. Gerhard Roux, spokesman of the Administrator-General, had announced that "quite a number" of members of the security forces would be affected by the provisions of Proclamation AG 13 of 1989. It was also reported that the Administrator-General had announced that members of the South African security forces who "in the performance of their duties and functions in the territory had performed or failed to perform any act which amounted to a criminal offence" had also been granted an amnesty under the aforementioned Amnesty Proclamation. He had gone on to say that: "members of the erstwhile security forces who qualify in terms of the amnesty granted are thus afforded equal treatment to that provided for former PLAN fighters on 7 June 1989".

30. The Ad Hoc Working Group notes with dismay and great consternation that, whereas amnesty was granted to former South African security members, as stated in the above case, Mr. Leonard Sheehama has not been granted an amnesty.

31. At its 765th meeting, the representative of the Legal Assistance Centre informed the Ad Hoc Working Group that, taking into account the relevant circumstances, Mr. Sheehama deserved to be set free, as his acts had been politically motivated.

32. This raises once more the question of the criteria for considering a prisoner as a "political prisoner". The Ad Hoc Working Group relies on the practice of the Commission on Human Rights, which requires that objective criteria be respected. In the view of the Group, when, in the case of a liberation struggle, acts of violence are committed, these acts can, in the circumstances of the situation and taking into account the motive, be considered as exempt from criminal responsibility. This does not preclude

acts of this kind being considered in accordance with the criteria contained in the first Protocol of 1977 additional to the Geneva Convention of 1949.

6. Disappearances

33. As mentioned in the report of the United Nations mission on detainees, during the implementation of the Settlement Plan for Namibia several lists of persons allegedly detained by SWAPO were brought to the attention of the Special Representative of the Secretary-General. These included lists prepared by the International Society for Human Rights (ISHR), Amnesty International and SWAPO. Both Amnesty International and the International Society for Human Rights pointed out that it was difficult to obtain reliable information on detainees held by SWAPO and that their lists did not purport to be necessarily up-to-date or reliable. The Special Representative of the Secretary-General established a mission on detainees in pursuance of paragraph 7(c) and (d) of the Settlement Proposal Plan for Namibia for an investigation in Angola and Zambia, which took place from 2 to 21 September 1989. The mission's task was to ascertain whether any Namibians were still detained by SWAPO and, if so, to ensure their release and repatriation in order to enable them to return and participate in the electoral process. According to the Special Representative of the Secretary-General, the whereabouts of more than 1,100 individuals originally reported missing or detained was investigated and determined; but the fate of 275 persons remains unknown and inquiries are still pending.

34. On the other hand, according to concordant reports received by the Working Group, 530 persons are still unaccounted for. The Working Group was unable to clarify the discrepancy regarding the numbers of missing persons reported to it. Taking into account the fact that this question does not fall within its mandate, the Working Group was unable to clarify the matter of disappearances.

B. Economic, social and cultural rights

1. Right to work

35. In a society where menial work has always been done by the black population, there can be no expectation of any rapid change or immediate major transformation. The wages paid to black workers in Namibia are too low to provide them with decent and proper accommodation. Article 21(1)(e) of the Constitution provides for freedom of association including, inter alia, freedom to form and join associations or unions, include trade unions.

2. Right to education

36. At its 765th meeting, the Working Group was informed that, although racial segregation no longer existed in the school system, the situation in fact remained unchanged. The vast majority of black Namibians cannot avail themselves of the opportunity to benefit from desegregated schools because of the tremendous social, economic and other handicaps they have suffered in the past. It was stressed by many witnesses that there was an urgent need to help the Namibian people in various ways, including the teaching of English, before desegregation could become a reality.

3. Right to health

37. At its 765th meeting, a witness expressed concern over the problem of housing. He pointed out that, although there was some activity in the building sector, the houses that were now being constructed consisted of one-room apartments and were totally inadequate, as each family would comprise many members, often as many as 10.

38. As reported in the Namibian Worker of 14 February 1990 and confirmed by other first-hand sources of information, living conditions in areas like Katutura, which was visited by the Group, are very poor. There is a lack of adequate housing, and often many people have to share a room. Problems of hygiene resulting from overcrowding have often given rise to health hazards.

III. ANALYSIS OF HUMAN RIGHTS PROVISIONS CONTAINED IN THE CONSTITUTION

39. On 9 February 1990, the Constituent Assembly unanimously adopted the Constitution for an independent Namibia. It will become operative on 21 March 1990, the day of independence. The Ad Hoc Working Group has studied the main elements of the Constitution, which proclaims the Republic of Namibia as a sovereign, secular, democratic and unitary State based on the principles of democracy, the rule of law and justice for all. The multi-party democratic State has the characteristics of a presidential system. Chapter 3 (articles 5 to 25) incorporates most of the fundamental rights and freedoms laid down in the Universal Declaration of Human Rights, subject only to the declaration of a state of emergency (article 26), which must first be approved by a resolution of the National Assembly. In article 4, the Constitution deals with the acquisition and loss of citizenship. Article 26 elaborates circumstances in which a state of emergency may be declared.

40. Articles 79, 80 and 81 refer to the administration of justice. The Constitution provides for an independent judicial machinery capable of protecting basic human rights. It contains provisions for legal safeguards through the judicial power vested in the courts, and through the establishment of an ombudsman who is competent to provide individuals with legal assistance or advice as required. Under article 91(a) of the Constitution, the ombudsman has "the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of government (whether national or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society".

41. These fundamental rights and freedoms cannot be set aside easily and laws cannot be amended by a simple majority of the members of the Parliament. Mention should also be made of the provisions contained in chapter 11 relating to the principles of State policy, in particular articles 95, 97 and 98. Article 131 in chapter 19 of the Constitution contains provisions which entrench fundamental rights and freedoms, as provided for in chapter 3 of the said Constitution.

42. All rights provided for in the International Covenant on Civil and Political Rights are taken into account. The Constitution further contains

provisions on the rights of the child under article 15, the right to private property in article 16 and the right to education in article 20. The Constitution provides for primary education that is compulsory and free of charge and the right of individuals to create their own educational establishments.

43. Human rights and fundamental freedoms may be derogated from to a certain extent. Article 22 contains a clause on the "limitation upon fundamental rights and freedoms", and article 24 has a clause on "derogation". This clause is linked to the powers of the President to derogate from human rights during a state of emergency under article 26, and particular reference is made to rules applicable to persons under detention. Derogations are not permitted in respect of a series of fundamental rights which correspond to article 4 of the International Covenant on Civil and Political Rights. The provisions in regard to public emergency, state of national defence and martial law are regulated by way of parliamentary and judicial control.

44. Whilst the Constitution contains provisions on human rights which, in the opinion of the Working Group, are quite satisfactory and follow the principles developed within the United Nations, the real value of such a Constitution will depend on its implementation in the future.

IV. OBSERVATIONS AND RECOMMENDATIONS

A. Observations

45. In the light of the information received, the Ad Hoc Working Group of Experts formulates the following observations:

(a) The Ad Hoc Group of Experts wishes to take this opportunity to express to the Government of the Republic of South Africa its thanks for the co-operation extended to it, which allowed the Group to undertake this visit to Namibia. It therefore expresses the hope that such continued co-operation will enable the Group to visit South Africa in the near future, in accordance with Commission on Human Rights resolution 1989/5, paragraph 29.

(b) The Group welcomes the implementation of Security Council resolution 435 (1978), which culminated in the participation of the Namibian people in free and democratic elections in a general climate of peace and political pluralism provided for in the Constitution adopted on 9 February 1990.

(c) A preliminary examination of the Constitution reveals that due account has been taken of the provisions of the international covenants on civil and political rights, and economic, social and cultural rights. The Constitution also provides guarantees in the event of restrictions on the exercise of human rights during a state of emergency. In the opinion of the Group, these guarantees are in general consistent with the relevant international standards. The Constitution prohibits discrimination based on race, colour, ethnic origin, sex or religion, creed or social or economic status.

Exercise of civil and political rights

(d) While, on one hand, the discriminatory laws and measures which might

curtail the objectives of free and fair elections have been repealed, in accordance with Security Council resolution 435 (1978), the Working Group notes that most of the measures based on apartheid or other discriminatory concepts remain in force.

(e) The Working Group took note of the proclamation by the Administrator-General (AG 13 of 1989) granting amnesty to certain persons. Nevertheless, the Group questions whether such an amnesty should also automatically benefit all former members of the anti-riot units known as "Koevoet", in view of the atrocities committed for years against peaceful citizens. The Group is of the opinion that the amnesty law should not benefit this category of persons.

(f) Furthermore, the Group notes with concern that, under the terms of article 1, paragraph 3, of the above-mentioned Proclamation, the Administrator-General is given discretionary power to determine the category of persons eligible to be granted amnesty.

(g) Information and testimony received by the Group shows that not all Namibians who have lived abroad in order to take part in the liberation struggle of their people have returned to the country. Their absence is profoundly upsetting to their families who, given the situation, are likely to regard those who have not returned as disappeared persons. However, apart from the figures submitted to the Group, the exact number of persons who fall into this category is not known. All the political sources that have provided the Group with information on this question agree that the matter should be clarified and that the co-operation and assistance of all concerned, as well as of the international community, remains indispensable given the impact of this problem on the prospects for the essential task of building understanding and reconciliation in Namibia.

(h) The Group also received information to the effect that, contrary to what the international community had believed, the South African Government has not released all political prisoners. There is also controversy regarding the interpretation to be given to the term "political prisoner". This applies in particular to the case of Leonard Sheehama, as mention above (paras. 27 to 32). The case has not yet been settled and Mr. Sheehama remains in prison in South Africa. The Group believes that the concept of a political prisoner should be considered in accordance with the Geneva Conventions of 1949 and the first Additional Protocol of 1977. In this regard, the Group considers that the motive of the perpetrator and the circumstances of the act committed should also be taken into consideration.

(i) Regarding the administration of justice, the information received reveals that independent and impartial justice cannot be expected in a general legal context in which the national legislation continues to be based on the policy and philosophy of apartheid. However, some isolated cases have shown a certain measure of independence of the judiciary vis-à-vis the Executive.

(j) The Group notes that the investigations into the assassination of white SWAPO member Anton Lubowski are reported to be continuing and some suspects have been arrested.

Economic, social and cultural rights

(k) The Group would point out that enjoyment of these rights depends on the general standard of living of a population and on the general political context in which it lives. In the case of Namibia, subjected for years to the policy of apartheid and its associated practices, the Group noted that no significant progress has been achieved because all the factors are so interrelated as to produce negative effects.

(l) In a society where unemployment prevails and access to a good education has long been the privilege of whites alone, and where menial work has always been done by the black population, there can be no expectation of any rapid change or immediate major transformation. The wages paid to black workers in Namibia are too low to provide them with decent and proper accommodation or appropriate health care.

(m) The same may be said of the right to education. Discrimination in access to schools solely on the basis of colour or rase has theoretically been abolished. However, the Group notes that, for the majority of the black population, little has changed due to a number of elements inherited from the former regime. It is clear that pupils who have received a so-called Bantu education, with all that that implies in terms of lack of qualified teachers, shortage of equipment and educational facilities, combined with the fact that they have been brought up in a different environment, cannot suddenly become competitive, even if they are admitted to good schools.

B. Recommendations

46. In view of the aforementioned observations, the Ad Hoc Working Group of Experts on southern Africa recommends the following:

(a) The future Government of independent Namibia should repeal all laws and measures based on apartheid and discrimination.

(b) All political prisoners should be unconditionally released.

(c) The amnesty declared by the Administrator-General in Proclamation AG 13 of 1989 should not be extended to those members of the "Koevoet" who have committed or have been convicted of atrocities against innocent civilians.

(d) The international community should grant the Namibian people all necessary assistance to enable them effectively to enjoy their economic and social rights and, notably, the right to health, to well remunerated work in proper conditions of safety and health, and to decent housing.

(e) The Commission on Human Rights should invite the Working Group on Enforced or Involuntary Disappearances, in close co-operation with the Government of independent Namibia, to shed light on the situation of persons who are alleged to have disappeared.

(f) The Government should take all necessary steps to ensure that the human rights provisions of the Constitution are effectively implemented in practice.

(g) In addition, the Group reiterates the following recommendations contained in its interim report E/CN.4/1990/7, paragraph 281(c), (d), (e) and (f):

"281. (c) Since the people of Namibia, during the illegal occupation of their country, have suffered in many forms; since many innocent persons have been tortured and wrongfully convicted and imprisoned, and since private property has been destroyed during the illegal occupation of Namibia, the Group recommends the Commission to adopt a resolution:

" (i) requesting an in-depth study of all damage caused during the illegal occupation of Namibia; and

"(ii) recommending the setting up of a mechanism for settlement by which the damage occasioned could be compensated in an equitable manner.

"(d) In the light of the development of the situation prevailing in Namibia and its accession to independence, and considering that the United Nations should be able to assist any country in accordance with Articles 55 and 56 of the Charter of the United Nations with a view to promoting universal respect for and observance of human rights and fundamental freedoms, the Ad Hoc Group of Experts recommends that the Commission on Human Rights should request the Secretary-General to provide any advisory services and any other appropriate forms of assistance in human rights that may be requested by the future Namibian Government in order to promote democratic development and to strengthen the institutions responsible for ensuring respect for and promotion of human rights. Such assistance, both technical as well as legal, could be provided by designating a body that would contribute to the proper functioning of the above-mentioned institutions and report to the Commission on Human Rights in close co-operation with the Namibian authorities.

"(e) The Commission on Human Rights should... organize a seminar on human rights in post-colonial Namibia and the situation of children in consultation with the future Namibian Government.

"(f) The Commission on Human Rights should recommend that the Government of independent Namibia should accede to all international human rights instruments."

47. The present report was adopted by the Ad Hoc Working Group of Experts at Windhoek on 17 February 1990.